IN THE CLEAN WATER COMMISSION
AIR CONSERVATION COMMISSION, AND THE
HAZARDOUS WASTE MANAGEMENT COMMISSION
STATE OF MISSOURI

In Re	)	
	)	Appeal No _____
The Doe Run Resources Corporation,	)	_____
d/b/a The Doe Run Company	)	_____
Herculaneum Smelter	)	

SUPPLEMENTAL STATEMENT SETTING FORTH BASIS OF APPEAL OF APPELLANT THE DOE RUN RESOURCES CORPORATION

Issuance of Order

1 On September 25, 2001, the Director of the Missouri Department of Natural Resources ("MDNR) issued an Order to Abate and Cease and Desist Violations (' Order") to The Doe Run Resources Corporation, doing business as The Doe Run Company ("Doe Run") The registered agent for Doe Run received the Order on September 27, 2001 A mailed copy (not certified) was also received at Doe Run s offices on September 27, 2001

2 The Order alleges violations of the Missouri Hazardous Waste Management Law the Missouri Air Conservation Law, and the Missouri Clean Water Law The Order requires Doe Run to perform a number of actions It also asserts that the Director has the power to require additional actions in the future citing as the source of that authority the alleged violations and the three above named environmental laws The Order does not differentiate or explain which law was the basis for the various requirements and authorities asserted under the Order The various requirements and authorities asserted under the Order relate in one way or another to allegations of lead-bearing material leaving the facility Given the novel theories presented by the MDNR, all three laws could be related to all such requirements and asserted authorities

3 Consequentlv Doe Run must appeal the entire Order to each commission concerned with either the Missouri Hazardous Waste Management Law the Missouri Air Conservation Law, and the Missouri Clean Water Law The following describes the basis for our appeal of the Order Given the extremely short deadlines provided in the Order (some immediately and some within only a few days), Doe Run is obligated to appeal this Order immediately Therefore, Doe Run reserves the right to amend and modify its arguments prior to any hearing held to address this appeal

Doe Run has Already Addressed Concerns Regarding Lead Concentrate Haulage

4 Given the apparent concern in the Order with possible impacts from lead concentrate haulage through the City of Herculaneum, it is important to note which actions Doe Run has already taken to address this issue Prior to receiving the Order, Doe Run had instituted a number of procedures to eliminate to the greatest degree possible any lead concentrate spillage on the streets of Herculaneum

5 Contrary to what is indicated in the Order, Doe Run has been policing and enforcing a long-standing company requirement that all trucks hauling lead concentrate be covered both when entering the facility full and leaving the facility empty

6 Upon being notified that small amounts of what appeared to be lead concentrate were found on the street outside its facility in Herculaneum, Doe Run did arrange on short notice an extensive cleanup beginning on September 1 2001 of the haul routes including both wet sweeping with a phosphate solution and strong vacuuming of the two main haul routes (Main Street up to Joachim Ave and Station St and Brown St to Joachim Ave) with wet sweeping all the way to Highways 61/67 The cleaning of the haul routes from the facility to Highways 61/67 bv wet and/or dry sweeping has continued on a da ly basis

7 In addition to Doe Run's past practice of washing the wheels of trucks hauling lead concentrate, Doe Run has added manual pressure washing of the wheels, fender wells, undercarriage, and tailgates of trucks hauling lead concentrate

8 Doe Run has authorized and is about to commence construction of a new lead concentrate unloading facility This will ensure that wheels of the trucks hauling lead concentrate do not come in contact with any lead concentrate This new lead concentrate unloading facility is not required by the Order but will address the issue of truck wheels coming in contact with lead concentrate and tracking the material away from the unloading area

9 Doe Run also has commenced or is about to commence additional actions calculated to generally reduce fugitive emissions from the facility Doe run has already commenced sealing the employees' parking lots This will not only seal in any lead-contaminated dust that might be in the parking lots, but will make the sweeping of the lots more efficient In addition, Doe Run is about to pave the unpaved road on Doe Run property currently used to haul slag from the slag granulation area to the slag storage area Neither of these two projects are required by the Order

Order is Based on Mistaken Assumption that Lead Concentrate Haul Trucks are Currently Causing Lead Concentrates to be Deposited on Public Areas

10 In regard to the Order itself Doe Run has serious concerns that the key 'facts given as the apparent primary justification of the Order are incorrect The belief by the MDNR that there is a continuing problem with lead concentrate haulage and associated allegations about fugitive dust appear to be based primarily on the Notice of Violation ('NOV') issued on September 20, 2001 The statement in the NOV that particulate matter went 'beyond the premises of origin is false

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11 The statement was that Pat Dwyer of the SLRO observed a dump truck leaving the facility and that material that fell from the truck was subsequently carried 'across the public road' Given the terseness of the information provided in the NOV, it was necessary to contact Mr Dwyer to determine what kind of truck was involved and where he made his observations Conversations with Mr Dwyer on September 27th revealed that, rather than seeing a lead concentrate haul truck leaving the facility, what Mr Dwyer observed was what is known as a 'Moxy truck This is the type of truck used by Doe Run internally within its own facility to haul slag

12 These trucks haul slag from the facility's slag granulation area to its slag storage area. The trucks travel entirely within Doe Run property and do not 'leave' the facility and do not travel over any public road Consequently, any material that might fall from the truck would not blow across any "public road'

13 In addition, the slag is unlikely to be blown around as fugitive dust The slag is hardened material in granular form produced by application of water to molten slag Consequently, given its form and fact that it is wetted, the material is highly unlikely to produce any 'fugitive dust' during transportation of the material While visible emissions are likely, they would be associated with steam being given off of the fresh slag

14 Further conversations with Mr Dwyer indicate that, contrary to what is stated in the NOV Mr Dwyer's reference to 'blowing material may not have actually referred to any material observed falling from the truck but rather may refer to a "black cloud" that he said he observed originating in the direction of the slag storage area Given that the slag was wetted, this observation is more likely to have been diesel emissions than any fugitive dust of lead-bearing material

15 More important than the high improbability that the slag trucks could produce any 'fugitive dust" that would leave the Doe Run premises, is that fact that even if such material could leave the facility it would not pose a 'clear and present danger' to the public Slag contains only a small percentage of lead, the physical form of the lead is one that has a very low bioavailability, and its physical nature is such that it is unlikely to be blown very far Small amounts of wind blown material simply would not present a "clear and present danger"

Response by Doe Run to Order

16 The Order requires Doe Run to do many things, including, but not limited to, ceasing all releases of fugitive dust and conducting certain activities concerning haul roads, employee parking lots, and lead concentrate haulage According to the Order, all these requirements are cited as being authorized under Section 260 410, RSMo, Section 643 090(2), RSMo, and Section 644 056, RSMo

17 Under Section 260 410 RSMo, the Director is authorized to order abatement of a violation when he discovers that a violation does "exist' and certain circumstances exist Apart from the fact that Doe Run believes that the MDNR's alleged violation of Doe Run operating a hazardous waste disposal facility without a permit is without grounds and is separately contesting this NOV, the Order is invalid in that it does not address a continuing violation, alleged or otherwise Consequently, The Doe Run Company is hereby appealing this Order to the Hazardous Waste Management Commission

18 Under Section 643 090(2) RSMo, the Director is authorized to order abatement of a violation when he discovers that a party causes a discharge which constitutes a 'clear and present danger to the public or the environment Apart from the fact that Doe Run believes it will be shown that there was not a release of fugitive dust beyond the Doe Run premises, the

' facts presented in the Order depict merely a visual observation with no analysis or positive identification of material deposited outside the facility As indicated above discussions with Mr Dwyer indicate that the NOV may not even reflect what he believes he saw Given the likelihood that the emissions observed by the MDNR observer were diesel emissions rather than lead concentrate or slag, the MDNR has not made any determination showing a 'clear and present danger" and the Order is illegal Further the release of 'fugitive dust" from the Herculaneum facility has already been taken into consideration in the current lead State Implementation Plan (SIP), including modifications adopted by Missouri and approved by the U S Environmental Protection Agency in the multimedia AOC Such emissions would not be a violation of the Missouri law Consequently, The Doe Run Company is hereby appealing this Order to the Air Conservation Commission

19 Under Section 643 056, RSMo, the Director is authorized to order abatement of a violation when he discovers that a violation does exist' and certain circumstances exist The Order is not based on any facts alleging a discharge of pollutants into State waters, but rather is premised on the novel position that an air emission, even one regulated under a federal and state approved SIP, can be a violation of the water pollution regulations Such a position is contrary to past practices of the Clean Water Commission and if enforced only against Doe Run and not against every other air emission source in the State of Missouri, would be illegal under the Missouri and United States constitutions Consequently, The Doe Run Company is hereby appealing this Order to the Clean Water Commission

20 The Doe Run Company had either instituted prior to the Order or is committing to carry out many of the direct actions required under the Order Had the Director of the MDNR taken the opportunities specifically authorized by Missouri law under Section 260 410, RSMo

and Section 644 056 RSMo to engage in "conference, conciliation and persuasion with Doe Run, we are certain that actions satisfying the MDNR s goals could have been agreed to after we had a chance to explain that certain requirements are impossible, certain ones are not calculated to accomplish what the MDNR desires and may bear no relation to lead-bearing materials, certain ones may even be counterproductive, and certain ones may not be able to be implemented within the tight deadlines provided

Order is Unlawful Beyond the Jurisdiction of the Director, Arbitrary and Capricious and Without Basis in Law or Fact

21 In appealing the Order to the relevant Missouri commissions, Doe Run asserts that the Order is unlawful, beyond the jurisdiction of the Director of the MDNR, arbitrary and capricious and without basis in law or fact Further information setting forth these contentions are contained in the following paragraphs 22 through 46

Alleged "Facts" Underlying Order Are in Error

22 The information presented under 'Findings of Fact ' in Section I of the Order and relied upon by the Director to issue the Order contains errors Reserving the right to contest any of the Order s ' Findings of Fact", Doe Run identifies the following respects in which particular findings are without basis As explained above, the statements in Findings of Fact No 12 are in error, with the particular statement that fugitive dust was from a highly contaminated area not supported by the NOV (in fact the NOV states that the "fugitive dust" was from the material from the truck, not from a ' highly contaminated area")

23 The summary of quarterly monitoring results attached to the Order (Ex 3) contains errors and is misleading The Sherman Street monitor is stated to be out of attainment for the second quarter It was not The actual value was 1 47 not 1 5 The stated values for the Bluff Street and Dunklin monitors are higher than the actual values recorded More importantly

the reference in Finding of Fact 11 to increasing ambient concentrations of lead is in error The most recent information shows that the three highest reading monitors for August and September are showing considerable declines from the levels for the prior eight months (Dunklin is 58% lower Bluff Street is 41% lower, and Broad Street is 83% lower) Also, analysis of individual readings during the first two quarters shows that the higher averages experienced were not consistent but were caused by a few very high readings, indicating that the abnormally high readings could have been caused by activities involved with the construction of the lead SIP projects or by possible upsets in furnace operations

Alleged "Violations" are Not Violations

24 The alleged "violations' found in the Statement of Violations in Section II or the Order do not, as a matter of law state any violation of Missouri law Statement of Violation No 1 under authority of Section 260 510, RSMo, is incorrect in that, even if the spillage of lead concentrate constituted a ' hazardous substance emergency', the referenced section of Missouri law does not make the existence of such an "emergency" a violation of Missouri law Doe Run has in fact without ever receiving an order from the MDNR already removed the spilled material from the street Further any spillage of the 'pile ' referenced in the Order and cited in Exhibit 2 does not meet the definition of a 'hazardous substance emergency because it does not contain enough lead

25 Statement of Violation No 2 under authority of Section 260 390(1), RSMo, is incorrect for a number of reasons First, the material that apparently spilled from the lead concentrate haulage trucks was a commercial product, not a waste, and was not intentionally discarded In fact, when the existence of the material on the street was brought to the attention of Doe Run it was swept up and vacuumed from the street and processed through the smelter

Because this material was processed it is not considered a waste under either the Missouri or federal hazardous waste regulations (the material would be classified as a "commercial chemical product' and as such is not even listed with those commercial products considered hazardous when discarded)

26 Rather than Doe Run disposing of the material when it was in its possession, the spillage of lead concentrate occurred during commercial shipping which is controlled by the U S Department of Transportation Hazardous Materials regulations applicable to the carrier This rule (which classifies lead concentrate the same as saccharin, the lowest class of materials requiring control, and describes the material as posing a "minor" degree of danger and being a Low Hazard) addresses any spillage during transportation Unintentional spillage of material from commercial carriers has occurred many times in the past and neither the EPA nor the MDNR has previously treated such spillage as comprising the intentional act by either the shipper or the carrier of disposal of hazardous waste without a permit, a felony under federal law

27 The Statement of Violation under authority of Section 643 090(2), RSMo, is incorrect for a number of reasons First, the referenced statutory authority does not describe any violation by Doe Run of Missouri law but rather gives the authority of the Director to issue an order if he determines that there is a clear and present' danger posed by activities of the alleged polluter

28 As explained above, the factual basis underlying statements about fugitive dust are false because (1) the statement that the truck was leaving the Doe Run property was incorrect, (2) the statement that the fugitive dust left the premises was incorrect and, most importantly, (3) the statement that "fugitive dust' posed a "clear and present" danger was incorrect in that it was based on merely a visual observation without any collection or chemical

analysis As described above, the material described by the observer was, in fact, wetted slag which would not blow off the property and which, because of its low levels of lead and low bioavailability, would not pose a "clear and present danger to the public even if it did go off of the property

29 Even if the material sighted by the MDNR observer was neither steam nor diesel emissions, but was 'fugitive dust , the release of such material would not be in violation of Missouri law All emissions from the Doe Run lead smelter facility, including fugitive emissions, were considered in the promulgation of required activities under the lead SIP under federal law In the multimedia Administrative Order on Consent signed by both the EPA and the State of Missouri the projects and programs required under the lead SIP were found to be adequate to address the issue of lead emissions and to bring the surrounding area into compliance with the National Ambient Air Quality Standard for lead Given that the operation of uncovered Moxy trucks hauling slag within the Doe Run property has been carried out for many years, the current unilateral action of the MDNR to now declare an emergency is unwarranted and contrary to the lead SIP Given the requirements in Missouri law that state regulation of air pollutants can be no more stringent than that required under federal law the alleged ' fugitive dust emissions are not a violation under state law

30 The Statement of Violation under authority of Section 644 056, RSMo, is incorrect First, factually the MDNR has not demonstrated that any fugitive dust actually left or was likely to leave the Doe Run premises Second the MDNR has taken the unprecedented step of declaring that any release of an air contaminant beyond the boundaries of a facility is a violation of Missouri law even where the emissions are controlled by regulation specific air permits, or enforceable air implementation plans Clearly, every air emission in the state within

the watershed of any waters of the state would meet this definition Yet the MDNR has never sought to enforce this interpretation on all other air emitters Consequently the unequal enforcement of the MDNR is a violation of both U S and Missouri constitutions and therefore invalid

31 The Statement of Violation under authority of Section 644 056, RSMo only discusses a discharge of fugitive dust being allegedly in violation of Sections 644 051 1 and 644 076 1, RSMo The Order makes no finding that any particular discharge is an 'imminent and substantial endangerment' under the Clean Water Act Having made no such finding, the Order is also defective in that the Director was required to engage in 'conference, conciliation and persuasion" with Doe Run and did not do so before issuing any order

Order Does Not Meet Standard of Addressing Continuing Violations

32 The Order issued to Doe Run by the Director of the MDNR is an Order to Abate and Cease and Desist Violations As described in detail in the above discussions of the Statement of Violations in Section II of the Order, there are no continuing or on going violations involving lead concentrate haulage (apart from the general allegation that Doe Run s regulated air emissions from slag haulage are on-going violations of the Air Conservation Law) which might warrant the issuance of an abatement and cease and desist order

Actions Being Required Not Related to Alleged Violations or Not Supported by Facts

33 The actions being mandated under Section III of the Order are not related to the alleged violations stated in Section III of the Order Section III, Paragraph 1, requires certain activities be done to lead concentrate haulage vehicles, vehicles leaving the facility, and

employee parking lots The only information about 'fugitive dust' concerns slag trucks and do not involve either lead concentrate haulage vehicles leaving the facility, or employee parking The requirement about washing the beds of the lead concentrate trucks is actually counterproductive in that such trucks are already covered and any washing of the bed would increase the possibility of contamination of the streets by water containing lead-bearing material leaking from the truck

34 Section III, Paragraph 2, besides requiring work that Doe Run completed weeks ago, improperly requires that ' road dust ' concentrations along the haul routes be equivalent to other roads in Herculaneum Although the haul routes have been completely cleaned with a wet sweeper using a phosphate solution as well as dry sweepers, the porous nature of the asphalt indicates that some lead-bearing material will remain within the haul road which may be susceptible to being removed by a vacuum for testing Such material is not accessible to children and should not present any significant risk to them due to both its physical unavailability and low bioavailability As for the employee parking lots, Doe Run has already resealed the asphalt eliminating any source of lead-bearing material

35 Section III Paragraph 3 addresses lead concentrate delivery by 'open dump trucks , which as explained before, are not used by Doe Run to haul lead concentrate Doe Run does not understand how trucks covered with adequate tarps can be considered by the MDNR as open Given that no facts in either of the NOVs cited by the DNR attribute any contamination of Herculaneum streets from an ' open truck, these requirements bear no relationship to the alleged violations Because the MDNR appears to believe that ' tarped" trucks are open trucks Doe Run is particularly concerned that the State of Missouri is stating that it has authority to ban commercial shipments of feed material even where it meets the federal DOT Hazardous

Materials Transportation regulations Because Doe Run is currently not able to ship lead concentrate feed material by rail, this restriction could result in a stoppage in operations and major layoffs at the facility, which stoppage could affect or even close operations at other Doe Run facilities

36 Section III Paragraph 4 appears to require characterization of indoor dust at all homes, regardless of whether they have high residential soil lead levels, whether the children in such homes have elevated blood leads, or whether the homes are even near any haul routes The requirement for Doe Run to pay for all such characterization and remediation is beyond the MDNR s authority bears no relation to the fugitive dust" issue raised by, and refuses to take into account other sources of lead, such as lead paint, likely to be found in older homes Saying that the only source of lead is the Herculaneum smelter is belied by the Missouri Department of Health's (' MDH) own statements last year that 50,000 children in the State of Missouri had elevated blood leads The 2000 blood lead survey in Herculaneum identified ten children with elevated blood leads, it cannot be assumed that those ten were never exposed to other sources of lead as were the rest of the 50,000

37 Section III Paragraph 8, orders that Doe Run "immediately cease transport of lead concentrate ' if any ' of the actions are not taken within the prescribed timeframes As stated in the comments on Paragraph 3, this threatens Doe Run with plant closures not only at Herculaneum, and could cause major layoffs with no justification under the law Under the terms of this order, emitting of any fugitive dust permitted under the lead SIP and facility air permit, failure to submit a plan, or failure to clean the haul roads (which cannot be cleaned to the standards the MDNR are expecting) would result in serious economic impacts on the company and its workers Even if the MDNR was justified in taking some specific action to address on-

going violations, it clearly is not authorized to exact such severe economic consequences on the company and its workers, when other less extreme actions would suffice

Determination of "Clear and Present Danger" is Not Supported by Facts and is Invalid

38 In regard to the portion of the Order said to be issued under the authority of Section 643 090(2), RSMo, the Director in Finding of Fact 19, appears to rely entirely on Exhibit 7, a letter from the Director of the Missouri Department of Health The statements in the letter of the Director of the Department of Health only dealt with amounts of lead bearing material found on the road, not with the ' fugitive dust' of some unidentified material referenced in the Order The Director of the Department of Natural Resources not the Director of the Department of Health, must make the determination whether the discharge of fugitive dust constitutes a clear and present danger In making this determination, the Director cannot rely on the statements made by the Director of the Missouri Department of Health (MDH) in her September 24, 2001 letter

39 The statements by the Director of the Department of Health are opinions by that Director They are not an agency decision arrived at after thorough consideration of the issues and compliance with Missouri administrative procedures Such an ex-parte opinion is not subject to challenge by Doe Run and would not be reviewable in Missouri courts Doe Run believes strongly that the statements of the Director of the MDH are not supported by the facts in this case The finding of small amounts of lead concentrate in certain locations on the streets of Herculaneum does not equate to a significant public health risk

40 As is clear from the EPA s IEUBK lead uptake model, determining actual risk to the population of Herculaneum, especially children and pregnant women depends on many factors These factors include the following (1) The total amount of material available (a small

amount of lead concentrate that does not have enough lead even to reach the threshold of constituting a hazardous substance emergency' does not pose a risk to the entire city of Herculaneum), (2) the material s bioavailability (the lead in lead concentrate, as opposed to forms of lead in lead paint and in certain smelter emissions is very insoluble with little biological uptake in humans), and (3) actual degree and duration of exposure to the high risk individuals (exposure to the concentrations referred to by the MDH Director occur only in the street where any contact by children or pregnant women would be brief) Thus any finding of a ' clear and present danger ' cannot scientifically be justified if only based on a comparison of the residential soil cleanup level of 400 ppm lead (based on default parameters assuming no site-specific information) with the concentration of lead in a small pile in the street

41 Although the increased haulage of lead concentrate through Herculaneum streets has occurred over the past three years, testing of prenatal and nursing mothers in Herculaneum in August 2000 showed that the average blood level in this protected group of people was the very low and safe level of 1 5 ug/dl a level posing no significant risk under medical standards set by the Center for Disease Control and used by the MDH If lead concentrate haulage, especially when the haulage occurred prior to the various actions now being taken by Doe Run to limit exposure to the public from lead concentrate haulage, posed such a ' clear and present danger , the testing should have show a significant risk Where several years or more of exposure (especially if one includes any fugitive emissions from the facility) failed to result in any demonstrated risk to pregnant women and nursing mothers clearly the MDNR s assumption that there is an emergency requiring that many parts of the Order be implemented immediately or within only a few days is invalid and such short time frames unreasonable

Order Conflicts with Missouri Statutory Programs

42 To the extent that the Order deals with ongoing air emissions already regulated under both federal and state air pollution control laws, the requirements of the Order interfere with and conflict with the regulatory regime established in Missouri and elsewhere for controlling such air emissions Especially where the issue is lead emissions, there has been much study of the best way to achieve the National Ambient Air Quality Standard for lead This extensive review by appropriate federal and state agencies has resulted in a comprehensive plan to address all potential sources of lead emissions at the smelter, including fugitive Emissions, to achieve compliance with the national standard This plan was required of Doe Run through the publication and approval of a comprehensive lead state implementation plan ('SIP) The most recent modifications to the SIP were approved by the Air Conservation Commission and submitted to the United States Environmental Protection Agency The use of this modification was approved by both the State of Missouri and the U S E P A in the Multimedia AOC

43 Despite the previous thorough review of lead emissions from the facility and the adoption of a comprehensive lead SIP, agreed to by EPA and the state, the MDNR now issues requirements that are at odds with the lead SIP In doing so, the MDNR bases its action on a single visual observation (about what appears now to be diesel emissions) with no collection of the alleged ' fugitive dust , no measuring of lead in such samples and no modeling of emissions to even predict what such impacts would be and whether there would be any need to amend the SIP before the extensive and expensive SIP projects have even been completed by Doe Run Such an Order is in conflict with the air regulatory program and the Air Conservation Commission should rescind the Order

44 The Order also fails to recognize that fugitive emissions have been addressed in the facility s air permit In response to the requirement for comprehensive air permitting under Title V of the federal Clean Air Act an air permit application was submitted for the Herculaneum facility in 1997 This permit application specifically addressed fugitive dust from the following sources concentrate storage, secondaries storage, slag storage and plant-wide resuspension both from plant surfaces and from traffic resuspension Consequently the very fugitive emissions subject to the Order have already been addressed in the Missouri air permit process four years ago and any emissions of such fugitive dust is in compliance with Missouri and federal law

45 The Order also makes conclusions about the air emissions of "fugitive dust" violating provisions of the Clean Water Act This portion of the Order makes no allegation that there are unpermitted discharges from the Herculaneum facility or that any discharge is in violation of the water discharge permit issued to Doe Run The Order ignores the fact that storm water from the smelter facility is, in fact, collected and treated, even though the current wastewater discharge permit does have an outfall for stormwater A new facility wastewater discharge permit application submitted in September 1999 also included a new discharge point for stormwater from the slag storage area Further, the control of water discharges from the facility are also addressed in the multimedia AOC

46 Given that the MDNR has made no allegation of any violation of Clean Water Act regulations or permit conditions for the Doe Run facility, the use by the MDNR of the general prohibition against water pollution as a basis for an alleged violation coupled with the fact that the MDNR has not issued such Orders against other air emitters shows that the Order ignores

and is contrary to the primary program regulating discharges of pollutants to waters of [illegible]

For this reason the Clean Water Commission should rescind the Order

Order is Illegal to Extent that It Conflicts with U S Hazardous Materials Transportation Regulations and Violates the Commerce Clause of the U S Constitution

47 In addition to all the various flaws in the Order, including mistatments of fact alleging 'violations that are not violations, requiring actions that are not related to the alleged violations, failing to support or justify the determination finding a ' clear and present danger" to the public, and issuing an order that conflicts with established regulatory programs in the State of Missouri, the Order attempts to rewrite the federal hazardous materials regulations to change commercial shipping of such materials The applicable federal statute specifically preempts any such attempt by a state to so affect commerce Even if such an act was not specifically preempted, imposing such a burden on commerce violates the U S Constitution This is clearly true in this case where the MDNR has made no showing that covered lead concentrate trucks, after washing of wheels, wheel wells, undercarriages, and tailgates would pose any risk to the public

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